

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL WARZEK,

Plaintiff,

v.

VALLEY STATE PRISON, et al.,

Defendants.

No. 1:20-cv-00027-ADA-GSA (PC)

ORDER ADOPTING FINDINGS AND
RECOMMENDATIONS, IN PART, AND
GRANTING DEFENDANTS' RULE 12(b)(6)
MOTION TO DISMISS IN PART, WITH
PARTIAL LEAVE TO AMEND

(ECF Nos. 4, 22, 47)

Plaintiff Michael Warzek ("Plaintiff") is a state prisoner proceeding pro se with this civil rights action filed pursuant to 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On March 27, 2023, the Magistrate Judge entered amended findings and recommendations recommending that Defendants' motion to dismiss filed on January 27, 2022, be granted in part, without leave to amend. (ECF No. 47.) The findings and recommendations also recommended that this case proceed against Defendants Fisher and Moosbauer for violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA), violation of the First Amendment Free Exercise Clause, adverse conditions of confinement in violation of the Eighth Amendment, failure to protect Plaintiff in violation of the Eighth Amendment, and violation of Plaintiff's rights to equal protection; against Defendant Cruz for adverse conditions of confinement in violation of the Eighth Amendment; and against Defendant Moosbauer for retaliation in violation of the First Amendment;

1 and that the Court dismiss all other claims and defendants, with prejudice, for Plaintiff's failure to
2 state a claim. (*Id.* at 58.) On May 3, 2023, Plaintiff filed objections to the findings and
3 recommendations. (ECF No. 50.)

4 In his objections, Plaintiff first argues that he satisfies the claim presentation requirement
5 pursuant to California Government Code § 900 et seq. (ECF No. 50 at 1.) Plaintiff states that he
6 "bears no responsibility for the time lapse once the claim is presented to an agent of the state." (*Id.*
7 at 2.) As mentioned in the findings and recommendations, Plaintiff claims that Defendants have
8 violated California Regulations under Title 15 and Title 3 of the California Code of Regulations,
9 which requires Plaintiff to satisfy the claim presentation requirement contained in California
10 Government Code § 900 et seq. *See State v. Superior Court (Bodde)*, 32 Cal. 4th 1234, 1237 (2004)
11 ("[A] plaintiff must timely file a claim for money or damages with the public entity. (§ 911.2.)
12 The failure to do so bars the plaintiff from bringing suit against that entity. (§ 945.4.)"). In his
13 First Amended Complaint ("FAC"), Plaintiff failed to provide evidence that he timely submitted a
14 government claim. (ECF No. 47 at 57.) Plaintiff's objections do not address the Magistrate Judge's
15 concerns about the timeliness of his government claim submission. (*Id.*)

16 Secondly, Plaintiff objects to the findings with respect to Defendant Cruz, particularly the
17 findings on supervisory liability. (ECF No. 50 at 3-4.) "A supervisor is only liable for the
18 constitutional violations of . . . subordinates if the supervisor participated in or directed the
19 violations, or knew of the violations and failed to act to prevent them." *Taylor v. List*, 880 F.2d
20 1040, 1045 (9th Cir. 1989). Upon review of the FAC, Plaintiff fails to state a claim against
21 Defendant Cruz because he did not establish a causal connection between supervisor conduct and
22 the deprivation of Plaintiff's constitutional right. Plaintiff solely alleges that Defendant Cruz
23 refused to send replacement meals and allowed for the theft of items inside the Kosher meals, and
24 this allegation alone does not establish supervisory liability. *Cf. Johnson v. Duffy*, 588 F.2d 740,
25 743-44 (9th Cir. 1978) (holding that the defendant had the responsibility of transferring the plaintiff
26 to a different institution and that he had not delegated his duty, which may subject the defendant to
27 section 1983 liability).

28 However, in his objections, Plaintiff states that Defendant Cruz "has the keys to and controls

1 access to the kosher food cart.” (ECF No. 50 at 3-4.) Plaintiff further explains that Defendant Cruz
2 also unlocks the cart so that other officers can compromise the meals. (*Id.*) Defendant Cruz appears
3 to have directly participated as a supervisor. Given these allegations, the Court will grant Plaintiff
4 the opportunity to amend his complaint. *See Moss v. U.S. Secret Serv.*, 572 F.3d 962, 972 (9th Cir.
5 2009) (“Courts are free to grant a party leave to amend whenever ‘justice so requires,’ and requests
6 for leave should be granted with ‘extreme liberality.’”). Because it would not be futile to give
7 Plaintiff the opportunity to amend his complaint, the Court grants leave to amend only his claims
8 against Defendant Cruz and no other Defendants or claims. *Brown v. Stored Value Cards, Inc.*,
9 953 F.3d 567, 574 (9th Cir. 2020) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

10 Lastly, Plaintiff objects to the findings and recommendation that Defendant Paez be
11 dismissed. (ECF No. 50 at 4-6.) The Court declines to adopt the Magistrate Judge’s findings and
12 recommendations with respect to the First Amendment retaliation claim against Defendant Paez.
13 Plaintiff argues that Defendant Paez did more than verbalize his discrimination towards Plaintiff.
14 (*Id.* at 5.) The Magistrate Judge characterizes Plaintiff’s allegations against Defendant Paez as
15 vague and conclusory, failing to state any claims. (ECF No. 47 at 41.)

16 However, Plaintiff alleges that Defendant Paez threatened Plaintiff with Rules Violation
17 Reports, retaliatory searches, and removal from the institution, in response to “attempts to having
18 spoiled meals exchanged at the dining hall.” (*Id.* at 40; ECF No. 4 at 14.) Plaintiff alleges protected
19 conduct under the First Amendment. *See Gathrite v. Wilson*, No. 3:19-cv-01852-JAH-NLS, 2020
20 WL 4201668, at *6 (S.D. Cal. July 22, 2020) (holding that an informal, verbal complaint submitted
21 to a superior constitutes protected activity); *Ahmed v. Ringler*, No. 2:13-cv-1050 MCE DAD P,
22 2015 WL 502855, at *4 (E.D. Cal. Feb. 5, 2015) (holding that inmate’s verbal complaints about
23 improper search of cell and seizure of his property to superior constituted protected conduct);
24 *Hackworth v. Torres*, No. 1:06-CV-773-RCC, 2011 WL 1811035, at *1 (E.D. Cal. May 12, 2011)
25 (rejecting the defendant’s argument that prisoner’s verbal objections to a prison policy during
26 housing classification committee meeting with prison staff was not protected by the First
27 Amendment because the inmate had not filed a written grievance); *see also Leslie v. Claborne*,
28 1:19-cv-00366-NONE-GSA-PC, 2021 WL 4523720, at *4 (E.D. Cal. Oct. 4, 2021) (finding the

1 plaintiff's reporting of officer misconduct to a captain was protected); *Uribe v. McKesson*, No.
2 08CV01285 DMS (NLS), 2011 WL 9640, at *12 (concluding that prisoner's attempt to report a
3 prison official's misconduct, either "verbally or in writing, constitutes speech or conduct entitled to
4 First Amendment protection").

5 Contrary to the Magistrate Judge's findings, Defendant Paez's alleged conduct chilled
6 Plaintiff's exercise of First Amendment rights because it may be inferred that Defendant Paez's
7 conduct deterred Plaintiff from further asking for exchanged meals. *See Watison v. Carter*, 668
8 F.3d 1108, 1116 (9th Cir. 2012) (reversing dismissal of retaliation claim and holding that "chilling
9 effect" pleading element was satisfied where prisoner alleged that guard refused to serve him one
10 breakfast in retaliation for filing an inmate grievance); *Martin v. Hurtado*, No. 07cv0598 BTM
11 (RBB), 2008 WL 4145683, at *9 (S.D. Cal. Sept. 3, 2008) (denying motion to dismiss a retaliation
12 claim for failure to allege chilling effect where the plaintiff alleged he had his television confiscated
13 because this harm would chill the exercise of First Amendment rights); *Rhodes v. Robinson*, 408
14 F.3d 559, 568 (9th Cir. 2005) ("[A]t the pleading stage, we have *never* required a litigant, *per*
15 *impossible*, to demonstrate a total chilling of his First Amendment rights . . . to perfect a retaliation
16 claim.").

17 On a motion to dismiss, "[t]he issue is not whether a plaintiff will ultimately prevail but
18 whether the claimant is entitled to offer evidence to support the claims." *Jackson v. Carey*, 353
19 F.3d 750, 755 (9th Cir. 2003) (internal quotation marks and citation omitted). In fact, "it may
20 appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the
21 test." *Id.* (internal quotation marks and citation omitted). For all the foregoing reasons, the Court
22 finds Plaintiff's FAC alleges sufficient facts to plausibly suggest that he is entitled to relief under
23 his First Amendment retaliation claim against Defendant Paez.

24 In accordance with the provisions of 28 U.S.C. § 636(b)(1)(B) and Local Rule 304, this
25 Court has conducted a de novo review of this case. Having carefully reviewed the entire file,
26 including Plaintiff's objections, the Court finds the findings and recommendations to be supported
27 by the record and proper analysis, except as described below.

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Accordingly,

1. The amended findings and recommendations issued on March 27, 2023, (ECF No. 47), are ADOPTED IN PART;
2. Defendants' motion to dismiss, filed on January 27, 2022, (ECF No. 22), is GRANTED IN PART, with leave to amend only claims made against Defendant Cruz;
3. This case will proceed with the First Amended Complaint filed on February 4, 2020, (ECF No. 4), against:
 - (1) Defendants Fisher and Moosbauer for violation of RLUIPA, violation of the First Amendment Free Exercise Clause, adverse conditions of confinement in violation of the Eighth Amendment, failure to protect Plaintiff in violation of the Eighth Amendment, and violation of Plaintiff's rights to equal protection;
 - (2) Defendant Paez for violation of Plaintiff's First Amendment right against retaliation;
 - (3) Defendant Cruz for adverse conditions of confinement in violation of the Eighth Amendment; and
 - (4) Defendant Moosbauer for retaliation in violation of the First Amendment;
4. All other claims and defendants in the First Amended Complaint, excluding Plaintiff's claims against Defendant Cruz, are DISMISSED with prejudice for Plaintiff's failure to state a claim; and
5. This case is referred back to the Magistrate Judge for further proceedings.

IT IS SO ORDERED.

Dated: September 12, 2023


UNITED STATES DISTRICT JUDGE